



February 20, 2020

The Honorable Rep. Zack Hudgins
Chair of the House Innovation, Technology & Economic Development Committee
Washington House of Representatives
438A Legislative Building
Olympia, WA 98504

RE: Washington SB 6281

Dear Chair Hudgins:

As the nation's leading advertising and marketing trade associations, we collectively represent thousands of companies, from small businesses to household brands, across every segment of the advertising industry. We write to express our deep concerns with certain amendments under consideration by Washington's House Innovation, Technology & Economic Development Committee (the "Committee") to SB 6281 that could cause significant damage to Washington's economic competitiveness and innovation without providing commensurate privacy protection for consumers.¹

Our organizations strongly support Washington's interest in protecting the privacy of its citizens. We recognize and appreciate the efforts made over the last year to update the state's privacy law to better protect consumers and provide more certainty for businesses. However, we oppose adoption of multiple amendments before the Committee that would run contrary to the privacy protections it intends and would negatively impact both consumers and businesses alike. Specifically:

- We oppose creating a private right of action. A private right of action could dramatically raise costs for Washington businesses, while creating inconsistent or contradictory regulatory requirements and failing to provide any meaningful privacy protections for consumers.
- We oppose modifying the definition of the term "sale" to include any processing of personal data. Such a change to the definition would be so far-reaching that it would encompass virtually any processing of personal data, even in the absence of personal information transfers.
- We seek minor clarification to definition of "sale" to ensure that vital data exchanges that occur through the Internet and support non-targeted advertising activities are not subject to consumer requests to opt out of sale.

Legislation is at its strongest and most effective when it appropriately incentivizes regulated entities and is free from ambiguities that can cause business confusion and consumer mistrust. We believe the approach detailed below to privacy legislation in Washington will better protect the privacy of residents of the state and will provide much needed clarity for businesses.

I. Including a Private Right of Action in SB 6281 Would Help Promote Frivolous Lawsuits And Hurt Innovation Without Helping Privacy

Adding a private right of action to SB 6281 with potential penalties that would punish companies that are good actors but inadvertently failed to conform to technical provisions of the law could have a

¹ See SB 6281, Reg. Sess. (Wash. 2020) (hereinafter "SB 6281").

chilling effect on Washington’s economy without providing any significant benefits for consumer privacy. Private litigant enforcement provisions and related potential penalties for violations represent an overly punitive scheme that would not effectively address consumer privacy concerns or deter undesired business conduct.

A private right of action would create a complex and flawed compliance system without tangible privacy benefits for consumers. Allowing private actions would flood the courts with frivolous lawsuits driven by opportunistic trial lawyers searching for technical violations, rather than focusing on actual consumer harm. Private right of action provisions are completely divorced from any connection to actual consumer harm and provide consumers little by way of protection from detrimental data practices.

A private right of action would also expose businesses to extraordinary and potentially enterprise-threatening costs for technical violations of the bill rather than driving systemic and helpful changes to business practices. It would also encumber businesses’ attempts to innovate by threatening companies with expensive litigation costs, especially if those companies are visionaries striving to develop transformative new technologies.

Beyond the staggering cost to Washington businesses, the resulting snarl of litigation could create a chaotic and inconsistent enforcement framework with conflicting requirements based on differing court outcomes. Overall, a private right of action would serve as a windfall to the plaintiff’s bar without focusing on the business practices that actually harm consumers.

As an alternative and more reasonable approach, we request that the Committee refrain from amending SB 6281’s “Liability” section so consumer data privacy enforcement responsibilities remain within the purview of the state Attorney General’s office.² This framework would lead to strong outcomes for consumers while better enabling businesses to allocate funds to developing processes, procedures, and plans to facilitate compliance with new data privacy requirements.

II. The Definition of Sale Should Remain Focused on Exchanges of Personal Data Rather Than Unreasonably Limit Uses of Personal Data

SB 6281 defines “sale” as “the exchange of personal data for monetary or other valuable consideration by the controller to a third party.”³ However, recent companion legislation considered by the Committee suggests that the Committee may attempt to amend SB 6281’s definition of “sale” to include any processing of personal data by a controller for consideration from a third party. As a result, any business use, collection, or storage of personal data would arguably be covered by the bill’s definition of sale.

A definition of “sale” that includes data processing activities would be overly broad and could encompass virtually any business service using data that is offered to consumers and the market. In the event of a consumer opt out from the sale of personal data, a covered entity under this definition would seem to be required to cease processing such personal data altogether—even processing activities that involve no transfers of the personal data to any other parties.

Including mere processing activities in the definition of sale would not reflect reasonable consumer expectations of “sales,” and our organizations believe that the Washington legislature does not intend to cover such a large range of data activities within the scope the bill’s “sale” definition. We

² *Id.* at § 11.

³ *Id.* at § 3(32).

therefore encourage you to refrain from adding a “processing” component to the definition so it is appropriately limited to exchanges or transfers of personal data for consideration.

III. Minor Clarifications to the Sale Definition Will Better Serve Consumers and Provide Needed Clarity for Businesses

SB 6281 would provide Washington residents with the right to opt out of “the processing of personal data concerning such consumer for purposes of targeted advertising, the sale of personal data, or profiling in furtherance of decisions that produce legal effects concerning a consumer or similarly significant effects concerning a consumer.”⁴ However, the bill does not clarify how the definitions of “targeted advertising” and “sale” work together, which could create confusion in the marketplace and for consumers when it comes to opt outs.

The term “targeted advertising” under the bill covers “displaying advertisements to a consumer where the advertisement is selected based on personal data obtained from a consumer’s activities over time and across nonaffiliated web sites or online applications to predict such consumer’s preference or interests.”⁵ The definition of targeted advertising explicitly *excludes* advertising: “(a) Based on activities within a controller’s own web sites or online applications; (b) based on the context of a consumer’s current search query or visit to a web site or online application; or (c) to a consumer in response to the consumer’s request for information or feedback.”

The definition of sale, however, does not include a similar delineation or exclusions.⁶ Sale is defined broadly as “the exchange or processing of personal data by the controller for monetary or other valuable consideration from a third party.”⁷ This definition, in conjunction with a lack of a carve out for the advertising activities that are explicitly excluded from the definition of “targeted advertising”, makes it unclear whether or not consumers can opt out of such activities by submitting a request to opt out of personal data sale. It is also not clear whether this opt out would cover essential ad operations that involve data exchanges – not for targeted advertising purposes – but for ad delivery, reporting, and ad fraud prevention.

We respectfully ask you to update the bill’s definition of sale to clarify this ambiguity in the legislation. We ask you to alter the definition of the term “sale” so it clearly states that an opt out from sale would not apply to activities that are carved out from the definition of targeted advertising as well as essential ad operations.

* * *

We and our members support Washington’s commitment to provide consumers with enhanced privacy protections. However, we believe the bill should not include a private right of action and instead should task the Attorney General with the responsibility of enforcing its terms. In addition, the bill’s definition of “sale” should cover exchanges of personal data alone and should be clarified so it contains the same exemptions that are present in the bill’s definition of “targeted advertising”. Such an approach would reduce ambiguity in the legislation, help to set concrete rules for businesses, and provide much-needed clarification regarding the scope of consumers’ rights under the bill.

⁴ *Id.* at § 6(5).

⁵ *Id.* at § 3(38).

⁶ *See id.* at § 3(32).

⁷ *Id.*

Consumer privacy is best served when businesses that leverage data do so in accordance with clear and concrete laws that leave little room for misunderstanding, misinterpretation, and manipulation, and where appropriate, enforcement mechanisms incentivize improving company practices.

Thank you in advance for consideration of this request.

Sincerely,

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